SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1965

No. 246

MICHAEL VETERE,

Petitioner,

v.

JAMES E. ALLEN, JR., Commissioner of Education of the State of New York; BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 12 OF THE TOWN OF HEMPSTEAD, NEW YORK; PATRICIA ANN MITCHELL, ET AL.; and THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

Respondents.

LEWIS HUMMEL and HERMAN ABRAMS,

Petitioners,

v.

JAMES E. ALLEN, JR., Commissioner of Education of the State of New York, and BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 12 OF THE TOWN OF HEMPSTEAD, NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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LEWIS HUMMEL and HERMAN ABRAMS,

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v.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioners Michael Vetere, Lewis F. Hummel and Herman Abrams, respectfully pray that a writ of certiorari issue to review an order of the Court of Appeals of the State of New York, entered on April 9, 1965.

Opinions Below

The majority opinion of the New York State Court of Appeals (reported at 15 N. Y. 2d 259, 206 N. E. 2d 174), is reprinted in Appendix A hereto at pages 27-29. The dissenting opinion of Judge Van Voorhis appears in Appendix A at pages 29-33. The dissenting opinion of Judge Scileppi appears in Appendix A at pages 33-38. The judgment of the New York Court of Appeals was entered on April 9, 1965 and is reprinted as Appendix B.

The respective opinions of the Appellate Division, Third Department (reported at 21 A. D. 2d 561, 251 N. Y. S. 2d 480) and of Special Term, Albany County (reported at 41 Misc. 2d 200, 245 N. Y. S. 2d 682) appear in the record at pages 12 and 38, respectively.

Jurisdiction

The judgment of the New York State Court of Appeals was entered on April 9, 1965. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1257(3), since the State of New York has deprived petitioners of the rights, privileges and immunities provided by U. S. Constitution, Amendment XIV and 42 U. S. Code Sections 2000c, *et seq.*

Question Presented

Are the petitioners deprived of equal protection of the laws, or of liberty without due process of law, by a directive of the New York State Commissioner of Education, which

- –excludes their children from their neighborhood schools which they would otherwise attend, and
- –requires them to transfer to more distant schools which they would not otherwise attend,

solely to achieve a racial mixture whereby no school may have "... 50 per cent or more negro pupils enrolled"?

Statutes Involved

U. S. Constitution, Amendment XIV.

* * *

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U. S. Code Section 2000C (Civil Rights Act of 1964, Section 401).

"As used in this title—

* * *

(b). 'Desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance."[1]

Statement

School District No. 12

Union Free School District No. 12 of the Town of Hempstead, New York, contains three elementary schools: the Woodfield Road School, the Davison Avenue School and the Lindner Place School (56)[2].

For some years these schools have admitted pupils form kindergarten through grade five, and each school has for many years been assigned an "attendance area" within the District. Such attendance areas have been selected

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[1] The present actions were commenced in 1963, prior to enactment of the Civil Rights Act of 1964 (Record, p. 49). Such Act was promptly raised during the appeals below (Appendix A, p. 23, *infra*).

[2] Unless otherwise indicated, parenthetical references are to page numbers in the certified record of proceedings below.

by the local Board of Education on the basis of geographical proximity of pupils' residences; availability of school facilities; safety and transportation considerations and other like educational factors; but without regard to race, color, creed or national origin of the pupils (56).

During a period of approximately five years prior to the commencement of these proceedings, increasing numbers of Negroes have moved into the portion of the District surrounding, and therefore served by, the Woodfield Road School. As a result of this wholly fortuitous occurrence, and not by reason of any act of the Board of Education, the Woodfield Road School now has a majority of Negro pupils (56). The percentage Negro enrollment at Woodfield Road is about 75%, and is about 14% at the other two schools (91, 92).

The Commissioner's Mandate for Racial Quotas

On June 14, 1963, the Commissioner of Education of the State of New York (herein the "Commissioner") issued a directive to all local school administrators (140). In this directive the Commissioner defined a "racially imbalanced" school as ". . . one having 50 per cent or more negro pupils enrolled" (143), and stated that

> ". . . there must be corrective action in each community where such imbalance exists" (142).

The Directive further stated that racial "imbalance" in the schools

> ". . . must . . . be eliminated from the schools of New York State" (142).

The Commissioner's directive further stated that ". . . it is the responsibility of local school authorities in such communities to develop and implement the necessary plans" (142). The directive went on to direct that each school district submit a report ". . . indicating the situation in

your district with regard to any problem of racial imbalance", as well as the plans of each district for future action regarding the "imbalance" (142, 143).

Although it has not yet been revealed how the Commissioner arrived at the fifty percent quota for determining racial "balance", he concedes that in November, 1961, he caused to be made a racial census, showing every district in New York State where racial "imbalance" existed (143).

The Present Controversy

In November, 1962, the Commissioner heard an administrative appeal by certain parents from a decision of the Board of Education of District 12 (herein the "Board") (62). The gist of this appeal was that the Board had declined to transfer the children of these parents from the Woodfield Road School into other schools [outside of the normal areas of residence and attendance] having a lower percentage of Negro students; and that such children were thereby deprived of equal educational opportunity (62, 63). The complainants did not contend, nor was any finding ever made, that their educational opportunity was lacking or unequal in any respect other than that of "racial imbalance". Rather, the essence of their complaint was

> ". . . that the student body of the Woodfield Road School is composed predominantly of Negro pupils and that the educational opportunities afforded in that school are therefore inferior" (88).

Upon receiving the appeal of the complainants [which was prosecuted before the Commissioner by the NAACP],[3] (162), the Commissioner referred the matter to a three-man "advisory committee" for findings of fact (88). The

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[3] The National Association for the Advancement of Colored People.

members of this committee were Kenneth B. Clark, Judah Cahn and John H. Fischer (88).

Of the three members of this committee, two were and are active as national officials in the NAACP, the party prosecuting the appeal. The NAACP entered the proceedings below as *amicus curiae* (10, 160).

Kenneth B. Clark is active as "social science consultant" to the Legal and Educational Division of the NAACP (Who's Who in America, 1962-1963) and has regularly appeared as a partisan witness for the NAACP in racial "balance" cases. Trial record, *Blocker* v. *Manhasset School Board,* 226 F. Supp. 208 (E. D. N. Y. 1964) page 1693.

Judah Cahn is a vice president of the NAACP (Who's Who in the East, 1961).

The dates of the foregoing references make it clear that at the time the Comissioner referred this matter to the committee, he knew of the partisan affiliations of Messrs. Clark and Cahn.

The Commissioner's Findings

The Commissioner's committee found, among other things, that

> "If racial difference were not a fact of life in this community, the attendance areas as defined could be cited as an excellent example of administrative planning. They are of suitable size, as compact as possible, and place the majority of children within convenient walking distance of their schools. There are programs of remedial work and enrichment for the Woodfield Road pupils at all grade levels" (93).
>
> * * *
>
> "The actions of the Board should not be termed arbitrary. In 1961 in response to the community situation the Board transferred students from Woodfield Road to the other two schools. These attempts although helpful have not solved the basic problem

which is the existence of a racially imbalanced school" (93, 94).

* * *

"In our visits to each of the schools we found no evidence of different educational standards. The quality of teaching appeared comparable. Pupil work was exhibited in the same way and the interest of pupils and teachers in class work was uniformly good (95).

* * *

"Class size at Woodfield Road is slightly lower than at the other schools. There is no overcrowding. With the rooms made available by moving all 6th grades to the central school, extra space will be available for special uses (96).

* * *

"No evidence was found of any deliberate action by the Board to create artificial school zones in an attempt to contain the Negro school population. On the contrary the only change that has been made in long established boundaries resulted in the transfer of Negro pupils from Woodfield Road to the other two schools. Each school has its own character but none could properly be called a poor school in any sense. Although as noted above the Lindner Place school is the newest building and somewhat more pleasing architecturally, the Davison Avenue and Woodfield Road Schools were constructed at about the same time, and are comparable buildings. Each, however, reflects in its enrollment the residential pattern of the neighborhood. This fact has created the racial imbalance in the Woodfield Road School (96, 97).

"Your Committee believes that in the entire complaint there is one basic and real issue. *Is the Woodfield Road School a racially imbalanced school? If it is, then it follows that the social psychological and educational problems which are ordinarily found in segregated or racially imbalanced schools are present in this situation.* Your Committee has found that the Woodfield Road School is in fact a racially imbalanced school" (97). (Italics supplied).

The Committee did not make, and did not purport to make, any finding of fact as to whether, in this particular case, any adverse "psychological and educational problems" existed by reason of the so-called imbalance.

The findings of the Committee were confirmed by the Commissioner himself (65).

The Committee proposed four alternative plans for the elimination of racial "imbalance" within the school district. The first of these would require that the Board of Education eliminate completely the attendance zones, and

> "(1) Reorganize the attendance areas of the District so that all pupils from kindergarten to grade 3 inclusive, will attend either Davison Avenue or the Lindner Place elementary school; all pupils in grades 4 or 5 will attend the Woodfield Road School" (101, 102).

The Committee concedes that under this proposal, "more pupils than at present will need to cross Ocean Avenue, a main street in the community;" and that children will travel a longer distance to school than they now do (103).

The Committee did not specifically endorse any one of its four alternative proposals, nor did it find that any one of such proposals would best serve the overall interests of the pupils within the district. The Committee did state, however, that the proposal quoted above would "* * * do most to satisfy the current complaints of the petitions" (105).

The Committee also considered and reported on the possibility of establishing a policy of "open enrollment" for the entire elementary system, whereby transfers would not be compulsory, but would be available to children of all races, on a voluntary basis (104). The Committee opined, however, that this alternative would be disadvantageous, in that

> "Most parents of white pupils would be unlikely to choose the option to transfer to Woodfield Road.

> Very few parents of Negro pupils ordinarily use an 'open enrollment' option'' (104, 105).

By a directive dated June 17, 1963, the Commissioner directed the Board of Education to adopt the above quoted proposal (62-73). The directive of the Commissioner, in six and one-half pages, makes seven express references to racial ''balance'' or ''imbalance'' (63-70). No mention is made of any other educational factors.

Although the Commissioner directed the Board of Education to adopt the rezoning plan suggested by his Committee, he conceded that

> ''(3) The Board of education has not been arbitrary in establishing or in refusing to change school attendance lines * * * (65); and
>
> ''(4) The educational standards at the Woodfield Road School are not below those of the other two elementary schools'', (65).

Subsequently, the Commissioner denied motions of the Board of Education to reopen the hearings (78).

Reasons for Granting the Writ

Is an American free to proceed through this life, and to attain the fruits of our society, unfettered and unencumbered by considerations of the race, color, religion or ethnic origin of himself or his neighbors?

Or, is an American to be accorded a particular beneficial or detrimental treatment before the law, dependent upon whether he is of one race or another, one religion or another, one national origin or another, or from a neighborhood consisting of one ethnic admixture or another?

This is one of the most crucial, if not the most crucial, of the Constitutional issues confronting the American people today.

The Commissioner of Education of New York State has answered this question with a decree requiring that every school district in New York State must achieve a racial "balance" in the schools (142). He defines racial "imbalance" as existing in any school which has " . . . 50 per cent or more negro pupils enrolled." (143).

The effect of this directive has been to destroy the value of neighborhood schools for those citizens of New York State, of whatever race, who are unfortunate enough to live in neighborhoods whose racial composition is not satisfactory to the Commissioner. Persons living in such neighborhoods are accorded a special, unequal treatment, in that their children are subjected to the hazards of being transferred from their existing neighborhood schools to more distant schools. This is required of them solely because of their race.

The extreme nature and result of the Commissioner's directive is depicted in Mayer, *Close to Midnight For the New York Schools*, New York Times Magazine, May 2, 1965, p. 34:

> "Public confidence in the school system is fearfully low and dropping. White children are leaving the city public schools at a rate of 40,000 a year (and the Allen Report, in a little-noticed passage, predicted by percentages a rate of 60,000 a year in the near future). Of the leaders of the school system itself—the nine-member Board of Education and the 20-odd deputy and associate superintendents—only a handful have children who attend or ever did attend a New York public school. Even worse, the Negro middle class has almost entirely disappeared. Of the Negro leaders of the integration drive, the Wilkenses and Clarks, the Farmers and Joneses and Rustins, the Youngs and Galamisons, not one has or has had a child in a New York public school."

I. Pupil assignments founded upon racial considerations are repugnant to the requirements of equal protection and due process.

This Court has held that assignments of public school pupils, solely on the basis of their race, amounts to a deprivation of equal protection of the laws.

> *Brown* v. *Board of Education*, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 583 (1954).

Similarly, this Court has held that pupil assignment predicated upon racial considerations constitutes an unconstitutional deprivation of due process of law.

> *Bolling* v. *Sharpe*, 347 U. S. 497, 74 S. Ct. 693, 98 L. Ed. 591 (1954). ["Classifications based solely upon race must be scrutizinzed with particular care, since they are contrary to our traditions and hence constitutionally suspect."]

See also, *Goss* v. *Board of Education of Knoxville*, 373 U. S. 683 at 684, 83 S. Ct. 1405, 10 L. Ed. 2d 632 (1963).

> [" . . .[W]e note that if the transfer provisions were made available to all students regardless of their race and regardless as well of the racial composition of the school to which they requested transfer, we would have an entirely different case. Pupils could then at their option (or that of their parents) choose entirely free of any imposed racial considerations to remain in the school of their zone, or to transfer to another.
>
> • • •
>
> "Classifications based on race for purposes of transfer between public schools, as here, violate the Equal Protection clause of the Fourteenth Amendment. As the Court said in [an earlier case] • • • 'racial classifications are obviously irrelevant and invidious' "].

II. Conflicting State and Federal decisions on the question of desired racial quotas makes a resolution of the present case of vital importance.

American life today is rife with conflicting contentions, by majority—and minority—groups, to the effect that restrictions should be imposed upon the one, or that special privileges should be accorded to the other, on the basis of racial or ethnic considerations.

It is essential in this area of our national life that the state adhere strictly to the principles of objective constitutional neutrality.

To subject our Constitution on the one hand to the demands of segregationists, who seek a compulsory separation of the races; or, on the other hand, to the demands of those who seek an across-the-board system of racial quotas, is in each instance to surrender the rule of objective laws to that of subjective men.

This Court, and some lower courts, have consistently recognized that the concept of compulsory racial quotas is repugnant to the overriding interest of constitutional neutrality.

> *Hughes* v. *California*, 339 U. S. 460, 94 L. Ed. 985, 70 S. Ct. 718 (1950) [petitioners held not entitled to picket, to secure compliance with demand that store employees be in proportion to the racial origin of its customers].
>
> *Downs* v. *Kansas City Board of Education*, 336 F. 2d 988 (10th Cir. 1964), *cert. den.* 380 U. S. 914, 85 S. Ct. 898, 13 L. Ed. 2d 800 (1965).
>
> See also *Collins* v. *Walker*, 329 F. 2d 100, 105, (5th Cir. 1964) *cert. den.* 379 U. S. 901, 85 S. Ct. 189 (1964) [deliberate inclusion of Negroes in a grand jury held as much a deprivation of equal protection as their deliberate exclusion].

Swain v. *Alabama*, 380 U. S. 202, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965) [defendant, convicted of felony, held not entitled of right to a racially balanced jury].

Wright v. *Rockefeller*, 376 U. S. 52, 84 S. Ct. 603, 11 L. Ed. 2d 512, *reh. den.* 376 U. S. 959, 84 S. Ct. 964 (1964) [petitioners held not entitled to a racially balanced Congressional election district].

However, the Federal Courts of Appeals, as well as State courts of last resort, have been unable to agree even upon the basic concepts which should apply in this area of legal controversy. Consequently, the law is unsettled, and should be reconciled.

Bell v. *School City of Gary, Indiana*, 213 F. Supp. 819, *aff'd* 324 F. 2d 209 (7th Cir. 1963), *cert. den.* 84 S. Ct. 1223, 377 U. S. 924, 12 L. Ed. 2d 216 (1964) [petitioners held not entitled of right to racially "balanced" public schools].

Morean v. *Board of Education of Montclair*, 42 N. J. 237, 200 A. 2d 97 (1964) [imposition of racial balance upheld].

Jackson v. *Pasadena*, 31 Cal. Rept. 606, 382 P. 2d 878 (1963) [petitioners held entitled to racially balanced schools].

Taylor v. *Board of Education of New Rochelle*, 191 F. Supp. 181, *aff'd* 294 F. 2d 36 (2d Cir. 1961) *cert. den.* 368 U. S. 940, 82 S. Ct. 382, 7 L. Ed. 2d 339 (1961) [racial "imbalance" in public schools held a deprivation of equal protection].

Rippy v. *Borders*, 250 F. 2d 690 (5th Cir. 1957) [petitioners held not entitled to racially "balanced" schools].

III. The fact that the Commissioner's action is authorized by State law does not dispose of his unconstitutional conduct.

The majority opinion of the Court of Appeals holds that the court cannot interfere with the Commissioner's administrative determination because he has the power to make it under State law. The majority opinion makes no reference to the underlying Constitutional problems.

This Court has made clear the rule that administrative actions of school officials, even if otherwise proper are nevertheless unconstitutional if founded upon racial considerations.

> *Griffin* v. *County School Board of Prince Edward County*, 377 U. S. 218, 12 L. Ed. 2d 256, 84 S. Ct. 1226 (1964) ["Whatever nonracial grounds might support a State's allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race . . . do not qualify as constitutional"].

IV. The Commissioner's determination is founded upon the views of one panel of "experts", on a question as to which "experts" differ. To allow racial assignments of pupils on such precarious foundations is to subject pupils to an unconstitutional standard of conduct.

The determination of the Commissioner (106-116) and the committee report on which it is based (88-105) are founded upon the "expert" presupposition that a racial "imbalance" in the schools, for whatever reason existing, justifies resort to racial transfer of pupils.

On this question, the views of learned educators, psychologists and sociologists embrace a wide range of opinions. The views of some (A) would, if extended, require the compulsory imposition of racial quotas to insure congregation of the races. The views of others, (B) equally learned in the academic sense, would if extended require a compulsory separation of the races. Still others (C) adopt the view that race should not be a factor in pupil assignment.

(A)

Clark, Kenneth B. and Clark, Mamie, 1952. "Racial Identification and Preference in Negro Children", in *Readings in Social Psychology,* Henry Holt and Co. pp. 551-560 (1952).

Clark, Kenneth B.: "Segregation as a Factor in the Racial Identification of Negro Pre-School Children: A Preliminary Report;" Journal of Exper. Education, Vol. VIII, No. 2 (1939).

Lundberg, George A. "Selective Association Among Ethnic Groups in a High School Population." *American Sociological Review,* Vol. 17 No. 1, pp. 23-25 (1952).

Goodman, Mary E. "Evidence Concerning the Genesis of Interracial Attitudes" *American Anthropologist,* Vol. 48, No. 4, pp. 624-630 (1946).

(B)

Hooton, *Up From the Ape* (1946).

Coon, *The Origin of Races* (1962).

Hall, "Zoological Subspecies of Man." *The Mankind Quarterly* (October, 1960).

Gordon, "Amentai in East Africa," 25 *Eugenics Review* (1934).

Pearl, "Weight of the Negro Brain", *Science* (November, 1934).

(C)

Conant, James Bryant, *Slums and Suburbs* (1961), pp. 27-29.

Handlin, Oscar, *Fire-Bell in the Night* (1964), pp. 56-58.

To subject the legal rights and immunities of pupils to the subjective views of such "experts", which range all the way from one extreme to another, in one time or another, is to abandon objective legal standards.

The proponents of compulsory racial quotas, like Sir Thomas More's Roper,[4] would "cut down every law in England" to destroy what they imagine to be the Devil. But when the whole forest of laws are cut down, and the same Devil lawlessness turns upon them, where will they find their refuge?

Today our social psychologists—at least the leaders of the discipine—are liberal and egalitarian in basic approach.

Suppose, in view of this fact, this Court is willing to leave the question of racial assignment in the hands of such men. Suppose further, that with a change of sociopolitical climate, the leaders of the discipline change—from egalitarian to racist.

What then will be the state of our Constitutional rights?

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[4] See Mendelson, *Felix Frankfurter: A Tribute* (1964), p. 19.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A—Decision of the Court Below

In the Matter of MICHAEL VETERE, Individually and as Parent and Natural Guardian of ANITA VETERE, an Infant, Appellant, v. JAMES E. ALLEN, JR., as Commissioner of Education of the State of New York, et al., Respondents.

In the Matter of LEWIS HUMMEL et al., Individually and as Parents and Natural Guardians of SALLY A. HUMMEL and Another, Infants, Appellants, v. JAMES E. ALLEN, JR., as Commissioner of Education of the State of New York, Respondent, and BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 12 OF THE TOWN OF HEMPSTEAD, NEW YORK, Appellant.

Argued November 16, 1964; reargued February 11, 1965; decided March 18, 1965.

Schools—segregation—courts have no power to review directive of State Commissioner of Education requiring local board of education to correct racial imbalance in its schools; such determination by Commissioner not arbitrary or illegal (Education Law, §§ 207, 301, 305, 310).

The Board of Regents, under authority of section 207 of the Education Law, has declared racially imbalanced schools to be educationally inadequate. The State Commissioner of Education, under authority of sections 301 and 305 of the Education Law, has implemented this policy by directing the local boards of education to take steps to eliminate racial imbalance. Such a specific directive, issued by the Commissioner after hearing an appeal from a determination of a board of education, is final and is not reviewable by the courts (Education Law, § 310), absent a showing of pure arbitrariness. The Commissioner may substitute his judgment for that of the local board even when the determination of the local board is not arbitrary. The courts have no power to evaluate the sociological, psychological and educational assumptions relied on by the Commissioner. The Legislature has endowed the Board of Regents and the

Commissioner with all but absolute power to make public policy and administrative decisions in the field of education. The Commissioner's determination was not arbitrary or illegal; hence the Appellate Division properly reversed so much of a judgment of Special Term as annulled the determination of the Commissioner, and dismissed the petition to review the Commissioner's determination.

Matter of Vetere v. *Allen*, 21 A D 2d 561, affirmed.

APPEAL from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered August 4, 1964, which modified, on the law and the facts and in the exercise of discretion, and, as modified, affirmed an order and judgment of the Supreme Court at Special Term (ISADORE BOOKSTEIN, J.; opinion 41 Misc. 2d 200), entered in Albany County in a proceeding under article 78 of CPLR, adjudging that the order of the Commissioner of Education directing the Board of Education of Union Free School District No. 12 of the Town of Hempstead to reorganize its attendance areas of the district should be annulled. By the modification the Appellate Division reversed so much of the order as annulled the determination of the Commissioner of Education and as denied a motion of said Commissioner to dismiss the petition.

Mason L. Hampton, Jr., C. William Gaylor and *H. Paul King* for petitioners-appellants. I. The Commissioner exceeded his judicial powers in overruling the board's pupil assignment plan, which he conceded was "not arbitrary" and an "excellent example of administrative planning." (*Matter of Board of Educ. of Cent. School Dist. No. 1, Town of Ramapo*, 65 N. Y. St. Dept. Rep. 106; *Matter of Board of Educ. of School Dist. No. 1, Vil. of Hempstead*, 70 N. Y. St. Dept. Rep. 108; *Matter of Bell*, 77 N. Y. St. Dept. Rep. 37; *Matter of Dileo*, 74 N. Y. St. Dept. Rep. 83; *Blocker* v. *Board of Educ. of Manhasset*, N. Y., 226 F. Supp. 208.) II. The Commissioner was wholly arbitrary in acting upon the assumption, not supported by facts in the

record before him, that racial "imbalance", for whatever reason existing, must be eliminated. (*Matter of Rosenbluth* v. *Finkelstein,* 300 N. Y. 402; *Matter of Stammer* v. *Board of Regents of Univ. State of N. Y.,* 287 N. Y. 359; *Matter of Kilgus* v. *Board of Estimate of City of N. Y.,* 308 N. Y. 620; *Matter of Macy & Co.* v. *New York State Labor Relations Bd.,* 192 Misc. 697, 275 App. Div. 665; *Taylor* v. *Board of Educ. of New Rochelle,* 191 F. Supp. 181, 294 F. 2d 36, 368 U. S. 940; *Gomillion* v. *Lightfoot,* 364 U. S. 339). III. The Commissioner's determination, which requires children in a certain neighborhood to leave their neighborhood school and transfer to a more distant school in order to achieve racial "balance", violates section 3201 of the Education Law. (*Matter of Balaban* v. *Rubin,* 20 A D 2d 438, 14 N Y 2d 193; *Matter of Strippoli* v. *Bickal,* 42 Misc 2d 475, 21 A D 2d 365). IV. The petitions state causes of action. (*Latham* v. *Father Divine,* 299 N. Y. 22; *Matter of Fabricius* v. *Graves,* 254 App. Div. 19, 913; *Matter of Ross* v. *Wilson,* 284 App. Div. 522, 308 N. Y. 605; *Matter of Hiscox* v. *Levine,* 31 Misc 2d 151; *Bareham* v. *Rochester,* 221 App. Div. 36, 246 N. Y. 140.) V. The Commissioner's requirement that pupils be transferred away from their neighborhood because of racial considerations violates constitutional guarantees of equal protection and due process. (*Brown* v. *Board of Educ.,* 347 U. S. 483; *Bolling* v. *Sharpe,* 347 U. S. 497; *Goss* v. *Board of Educ.,* 373 U. S. 683; *Cooper* v. *Aaron,* 358 U. S. 1; *Taylor* v. *Board of Educ. of New Rochelle,* 191 F. Supp. 181, 294 F. 2d 36; *Webb* v. *Board of Educ. of City of Chicago,* 223 F. Supp. 466.) VI. Administrative power to define attendance area lines inheres in the local boards of education and has not been granted to the Commissioner. (*People* v. *Dethloff,* 283 N. Y. 309; *Matter of De Angelis* v. *Laino,* 235 App. Div. 390, 260 N. Y. 661; *Lawrence Constr. Corp.* v. *State of New York,* 293 N. Y. 634; *Lantry* v. *Mede,* 127 App. Div. 557, 194 N. Y. 544.) VII. Lacking administrative power to determine attendance area zones, the

Commissioner may not usurp such power under the guise of quasi-judicial "review". (*Matter of Board of Educ. of City of N. Y.* v. *Allen*, 6 N Y 2d 127; *People ex rel. Board of Educ.* v. *Graves*, 243 N. Y. 204; *Matter of La Fontaine Props.* v. *McGoldrick*, 200 Misc. 518; *Matter of Burstyn, Inc.* v. *Wilson*, 278 App. Div. 253, 303 N. Y. 242, 343 U. S. 495; *Matter of Lewisboro-Vista Civic Assn.*, 73 N. Y. St. Dept. Rep. 178; *Matter of New York State Comm. Against Discrimination* v. *Pelham Hall Apts.*, 10 Misc 2d 346; *Bell* v. *School City of Gary, Ind.*, 213 F. Supp. 819, 324 F. 2d 209.) VIII. The power sought to be asserted by the Commissioner would necessitate the destruction of the private and religious school systems in the State of New York. IX. In the present case, the Commissioner failed to make factual inquiries or findings as to whether, in the present case, the so-called "imbalance" is the cause of any impairment of educational opportunity. Such conduct violates the fundamental rule that administrative determinations must be founded upon findings of fact. Otherwise they are capricious and arbitrary. (*Matter of New York State Guernsey Breeders Co-op* v. *Noyes*, 284 N. Y. 197; *Matter of Land Purch Corp. of America* v. *Grunewald*, 20 Misc 2d 175.)

Thomas L. Driscoll for Board of Education of Union Free School District No. 12, Town of Hempstead, New York, appellant. I. The Commissioner's decision and order is illegal and therefore arbitrary, capricious, and in defiance of the constitutional rights of petitioners in this proceeding and their children. (*Matter of Balaban* v. *Rubin*, 20 A D 2d 438, 14 N Y 2d 193.) II. The law of all of the cited cases and of all of the cases which have dealt with the question of imbalance is completely in accord with this appellant's contention. (*Bell* v. *School City of Gary, Ind.*, 324 F. 2d 209; *Brown* v. *Board of Educ.*, 347 U. S. 483, 349 U. S. 294; *Brown* v. *Board of Educ. of Topeka*, 139 F. Supp. 468; *Briggs* v. *Elliott*, 132 F. Supp. 776; *School Bd. of City of Charlottesville, Va.* v. *Allen*, 240 F. 2d 59; *Blocker* v.

Board of Educ. of Manhasset, N. Y., 226 F. Supp. 208; *Taylor* v. *Board of Educ. of New Rochelle*, 191 F. Supp. 181; *Henry* v. *Godsell*, 165 F. Supp. 87; *Matter of Bell*, 77 N. Y. St. Dept. Rep. 37; *Matter of Board of Educ. of School Dist. No. 1, Vil. of Hempstead*, 70 N. Y. St. Dept. Rep. 108.) III. The Commissioner's fact-finding committee's findings adopted by the Commissioner sustain the action and contention of this appellant. IV. The report and findings of the committee and the Commissioner clearly show that appellant Board of Education has acted reasonably and not in an arbitrary manner. V. The case of *Matter of Balaban* v. *Rubin* (20 A D 2d 438, 14 N. Y. 2d 193), cited by respondents, does not sustain the contentions of respondent Commissioner and others. VI. The Negro children attending the Woodfield Road School achieve just as well as those attending the other two grade schools in the district. VII. The recent Civil Rights Law provisions compel an annulment of the Commissioner's decision and order. VIII. The power to control the assignment of pupils to the schools in the district and determine area zones lies wholly within the local board of education. IX. The amendment of 1956 to section 1709 of the Education Law by the addition of subdivision 33 puts the absolute power in the local board of education to have the management of the schools in the district. X. Section 310 of the Education Law would have no effect in the case at bar. (*Matter of Bottenfield*, 77 N. Y. St. Dept. Rep. 25.) XI. The right of appeal to the Commissioner of Education provided in section 310 of the Education Law is not exclusive and does not oust the courts of jurisdiction in cases calling for the interpretation of a statute affecting a valuable right. (*Matter of McMaster* v. *Owens*, 192 Misc. 687; *Finley* v. *Spaulding*, 192 Misc. 860; *Matter of O'Connor* v. *Emerson*, 196 App. Div. 807.)

Charles A. Brind, John P. Jehu, Elizabeth M. Eastman, George B. Farrington and *Louis H. J. Welch* for Commis-

sioner of Education, respondent. I. The decision of the Commissioner is not "purely arbitrary". (*Brown* v. *Board of Educ.*, 347 U. S. 483; *Matter of Balaban* v. *Rubin*, 14 N Y 2d 193; *Matter of Strippoli* v. *Bickal*, 42 Misc. 2d 475, 21 A D 2d 365; *Matter of Addabbo* v. *Donovan*, 43 Misc. 2d 621; *Matter of Schnepp* v. *Donovan*, 43 Misc. 2d 917; *Blocker* v. *Board of Educ. of Manhasset, N. Y.*, 226 F. Supp. 208.) II. The decision of the Commissioner rendered under section 310 of the Education Law is final and conclusive and not subject to review in any court or place whatever. (*Matter of Board of Educ. of City of N. Y.* v. *Allen*, 6 N Y 2d 127; *Matter of Board of Educ. of Cent. School Dist. No. 12 of Town of Virgil* v. *Allen*, 14 A D 2d 429; *Matter of Cochran* v. *Levy*, 175 Misc. 666, 263 App. Div. 921; *Matter of Board of Educ. of Bethlehem Union Free School Dist.* v. *Wilson*, 196 Misc. 239, 277 App. Div. 809, 303 N. Y. 107; *Matter of Board of Educ. of Union Free School Dist. No. 1 of Town of Neversink* v. *Wilson*, 282 App. Div. 821, 847; *Matter of Soergel* v. *Allen*, 10 A D 2d 767, 9 N Y 2d 633; *Matter of Board of Educ. of Union Free School Dist. No. 3* v. *Allen*, 6 A D 2d 316, 6 N Y 2d 871, 6 N Y 2d 983, 361 U. S. 535; *Matter of Clark* v. *Allen*, 7 A D 2d 144, 8 A D 2d 665; *Gardner* v. *Ginther*, 232 App. Div. 296; *Lair* v. *Grant*, 137 Misc. 470; *Adriaansen* v. *Board of Educ. of Union Free School Dist. No. 1, Town of Marion*, 222 App. Div. 320; *Matter of District No. 2 of Town of Marion*, 31 N. Y. St. Dept. Rep. 426; *Matter of Common School Dist. No. 2 of Town of Waverly*, 33 N. Y. St. Dept. Rep. 53; *Matter of District No. 9 of Town of Kent*, 38 N. Y. St. Dept. Rep. 625; *Matter of District No. 15, Town of Esopus*, 71 N. Y. St. Dept. Rep. 139.) III. The statute itself authorizes and requires the Commissioner of Education to make such an order in a proper case. (*Matter of Szkolnik* v. *Allen*, 19 A D 2d 765; *Matter of Bowen* v. *Allen*, 1 Ed. Dept. Rep. 534, 29 Misc. 2d 35, 14 A D 2d 716, 17 A D 2d 12, 13 N Y 2d 663; *Bullock* v.

Cooley, 225 N. Y. 566; *Barringer* v. *Powell*, 230 N. Y. 37; *People ex rel. Hylan* v. *Finegan*, 227 N. Y. 219; *People ex rel. Board of Educ. of City of N. Y.* v. *Finley*, 211 N. Y. 51; *Matter of Hirshfield* v. *Cook*, 227 N. Y. 297; *People ex rel. Board of Educ.* v. *Graves*, 243 N. Y. 204; *Hutchinson* v. *Skinner*, 21 Misc. 729.) IV. The history and purpose of the statute support the power of respondent to make the order. (*Bullock* v. *Cooley*, 225 N. Y. 566; *Matter of Hirshfield* v. *Cook*, 227 N. Y. 297; *Matter of Board of Educ. of Cent. School Dist. No. 1, Town of Ramapo*, 65 N. Y. St. Dept. Rep. 106; *Matter of Board of Educ. of School Dist. No. 1, Vil. of Hempstead*, 70 N. Y. St. Dept. Rep. 108; *Matter of Board of Educ. of Union Free School Dist. No. 9, Town of Hempstead*, 71 N. Y. St. Dept. Rep. 166; *Matter of Davis*, 75 N. Y. St. Dept. Rep. 57; *Matter of Bell*, 77 N. Y. St. Dept. Rep. 37; *Matter of Taylor*, 1 Ed. Dept. Rep. 501; *Matter of Danker*, 2 Ed. Dept. Rep. 513.) V. The power here involved derives not from constitutional rights or duties of the parties, but purely and solely from the need to solve an essentially educational problem. (*Bell* v. *School City of Gary, Ind.*, 213 F. Supp. 819, 324 F. 2d 209, 377 U. S. 924; *People ex rel. Yale* v. *Eckler*, 19 Hun 609.)

Robert L. Carter, Joan Franklin and *Louis Steel* for remaining respondents. I. Boards of education have a constitutional duty to eliminate racial imbalance. (*Blocker* v. *Board of Educ. of Manhasset, N. Y.*, 226 F. Supp. 208; *Branche* v. *Board of Educ. of Town of Hempstead*, 204 F. Supp. 150; *Morean* v. *Board of Educ.*, 42 N. J. 237; *Brown* v. *Board of Educ.*, 347 U. S. 483; *Taylor* v. *Board of Educ. of New Rochelle*, 191 F. Supp. 181, 294 F. 2d 36, 368 U. S. 940; *Goss* v. *Board of Educ.*, 373 U. S. 683; *Holland* v. *Board of Public Instruction of Palm Beach County, Fla.*, 258 F. 2d 730; *Matter of Balaban* v. *Rubin*, 20 A D 2d 438, 14 N Y 2d 193; *Matter of Strippoli* v. *Bickal*, 21 A D 2d 365; *Matter of Addabbo* v. *Donovan*, 43 Misc. 2d 621; *Matter of Schnepp* v. *Donovan*, 43 Misc.

2d 917; *Ex Parte Virginia*, 100 U. S. 339.) II. Independently of the constitutional obligation to eliminate racial imbalance, the Commissioner's decision is reasonable and therefore, final and conclusive. (*Matter of Chapin* v. *Board of Educ. of City of Buffalo*, 291 N. Y. 241; *Matter of Board of Educ. of City of N. Y.* v. *Allen*, 6 N Y 2d 127.) III. The Commissioner's plan to correct racial imbalance is legal and constitutional. (*Fuller* v. *Volk*, 230 F. Supp. 25; *Board of Educ. of Waverly Community Unit School Dist. No. 6* v. *Nickell*, 410 Ill. 98.) IV. The Commissioner has power to direct a board of education to modify its pupil assignment policy to correct racial imbalance. V. The Commissioner is empowered to hear petitions of persons conceiving themselves aggrieved by the refusal of a local board to act consistently with State educational policy. (*Bullock* v. *Cooley*, 225 N. Y. 566; *Barringer* v. *Powell*, 230 N. Y. 37; *People ex rel. Board of Educ. of City of N. Y.* v. *Finley*, 211 N. Y. 51; *Matter of Board of Educ. of City of N. Y.* v. *Allen*, 6 N Y 2d 127; *Matter of Nestler* v. *Board of Examiners of Bd. of Educ. of City of N. Y.*, 192 Misc. 663; *Matter of Bomar* v. *Cole*, 177 Misc. 740; *Matter of Bowen* v. *Allen*, 17 A D 2d 12, 13 N Y 2d 663; *People ex rel. Hylan* v. *Finegan*, 227 N. Y. 219; *Matter of Delamater*, 60 N. Y. St. Dept. Rep. 17; *Matter of Beam* v. *Wilson*, 200 Misc. 183, 279 App. Div. 277; *Craig* v. *Board of Educ. of City of N. Y.*, 173 Misc. 969, 262 App. Div. 706; *Matter of Ross* v. *Wilson*, 284 App. Div. 522; *Matter of Board of Educ. of City of Oneida* v. *Tuttle*, 125 Misc. 230; *People ex rel. Yale* v. *Eckler*, 19 Hun 609; *Matter of Gable* v. *Gilbert*, 126 Misc. 185; *Matter of Belman*, 78 N. Y. St. Dept. Rep. 10; *Matter of Conlin*, 75 N. Y. St. Dept. Rep. 60.) VI. Section 311 (subd. 4) explicitly authorizes the Commissioner to compel compliance with his determinations by adopting all necessary measures. VII. Assuming the power of the board of education to determine attendance areas, this in no way negates the Commissioner's adminis-

trative control over boards in exercising such power or his authority to review and compel a variation in zoning practices.

Per Curiam. The issue posed by the petition in terms of racial balance, which balance the Commissioner now avers is essential to a sound education, is not reviewable by this court as the following quotations from opinions show. The purpose of the grant of quasi-judicial powers under section 310 of the Education Law is "to make all matters pertaining to the general school system of the state within the authority and control of the department of education and to remove the same as far as practicable and possible from controversies in the courts" (*Bullock* v. *Cooley*, 225 N. Y. 566, 576-577 [1919]). "By our state system of education protected by the Constitution and developed by much study and experience, the commissioner of education is made the practical administrative head of the system, and in his exercise of sound wisdom, as we believe, the legislature deemed it best to make him the final authority in passing on many questions bound to arise in the administration of the school system, and has provided an expeditious and simple method by which a disposition of such questions could be reached through appeal to him" (*People ex rel. Board of Educ. of City of N. Y.* v. *Finley*, 211 N. Y. 51, 57 [1914]). "In appraising the judicial nature of the act of the Commissioner of Education, it must be remembered that he combines both judicial and administrative functions. When he decides appeals where he has occasion to construe statutes, he undoubtedly acts in a judicial capacity. But in passing upon the propriety of educational policy by a particular school board or school district, he acts in a broader capacity than the courts, by reviewing at times administrative acts of discretion of which a court would refuse to take cognizance." (*Matter of Craig* v. *Board of Educ. of City of N. Y.*, 173 Misc. 969, 977, aff'd 262 App. Div. 706 [1941.] See, also, *Matter of*

Ross v. *Wilson*, 308 N. Y. 605, 617; State Commissioner's opinion of Feb. 15, 1965 in *Matter of Dixon* v. *Board of Educ. of City School Dist. of City of Buffalo*; L. 1812, ch. 242; L. 1854, ch. 97; L. 1864, ch. 555.)

This is merely a reaffirmation of a principle contained in New York law for over 130 years.

In *Easton* v. *Calendar* (11 Wend. 91, 93-94 [1833]), the court stated: "The plaintiff below was not without his remedy, 1 R. S. 487, § 110, 11; and the amendment of the law, 20th April, 1830, provides that any person conceiving himself aggrieved in consequence of any decision made by the trustees of any district in paying any teacher, or concerning any other matter under the present title (which includes the whole of the school act), may appeal to the *superintendent* of common schools, whose decision shall be final. This provision was intended for what it practically is, a cheap and expeditious mode of settling most, if not all of the difficulties and disputes arising in the course of the execution of the law. A *common law certiorari* would no doubt lie from this court to the trustees, to bring up and correct any erroneous proceeding not concluded by an adjudication of the superintendent, or in a case where his powers were inadequate to give the relief to which the party was entitled."

A recent case illustrating the Commissioner's unusual authority to overturn a local board's orders solely from the standpoint of alleged sound education policy is *Matter of Board of Educ. of City of N. Y.* v. *Allen*, 6 N. Y. 2d 127 [1959]. In that case a decision by the Commissioner that the local board's policy of requiring teachers who were former communists to identify colleagues as party members was educationally unsound was not disturbed by this court on the ground that his decision was final. In arriving at this result, the court was fully cognizant of the fact that both the Feinberg Law (Education Law, § 3022) and section 20.1 of the Board of Regents Regulations (8

NYCRR 20.1) directed boards of education to take steps to eliminate subversive elements in their school system. Here the Board of Regents under authority of section 207 of the Education Law has declared racially imbalanced schools to be educationally inadequate. The Commissioner under sections 301 and 305 of the Education Law has implemented this policy by directing local boards to take steps to eliminate racial imbalance. These decisions are final absent a showing of pure arbitrariness.

The Commissioner's decision in this case rests squarely on his finding of the inadequacy of such schools from the viewpoint of educational soundness. Since this court had decided that the Commissioner, when a similar policy judgment was made, may substitute his judgment for that of the local board even where the action of the local board was not arbitrary (*Matter of Board of Educ. of City of N. Y.* v. *Allen,* 6 N Y 2d 127 [1959], *supra*), the decision of the Commissioner in regard to racial balance is conclusive.

Disagreement with the sociological, psychological and educational assumptions relied on by the Commissioner cannot be evaluated by this court. Such arguments can only be heard in the Legislature which has endowed the Commissioner with an all but absolute power, or by the Board of Regents, who are elected by the Legislature and make public policy in the field of education.

Since we find that the determination of the Commissioner of Education is not arbitrary or illegal, the order of the Appellate Division must be affirmed.

The order of the Appellate Division should be affirmed, without costs.

Van Voorhis, J. (dissenting and voting to reverse and reinstate the order of Special Term). If, as I think, the action by the Commissioner of Education violates the Constitution of the United States and the Constitution and statutes of New York State, it is reviewable in the courts as

included in the class of conduct which is legally defined as purely arbitrary (*Matter of Ross* v. *Wilson*, 308 N. Y. 605).

By directing that all pupils from kindgergarten through grade 3 attend the Davison Avenue or Lindner Place Elementary School, and that all pupils in grades 4 and 5 attend the Woodfield Road School, after adopting the finding of his Advisory Committee that the attendance areas of these schools as defined by the Board of Education could be cited as an excellent example of administrative planning except for racial difference, the Commissioner of Education has made clear that he reversed the ruling of the Board of Education entirely in order to correct or reduce imbalance between the black and white races. The court is confronted directly with whether racial imbalance in the public schools, however it may be defined, can be overcome by admitting or excluding children from schools on account of their color. The purpose in the Commissioner's ruling is to blend the 75% Negro children in the Woodfield School with the white children in the other two elementary schools. The concentration of nonwhite children in the Woodfield School attendance area was not designed to promote racial segregation in the public schools but occurred on account of the geographical grouping of the races.

Section 3201 of the Education Law prevents a person from being excluded from any public school "on account of race, creed, color or national origin." Other statutes and constitutional provisions call for the same result (cf. U. S. Const., 14th Amdt. § 1; N. Y. Const., art. I, § 11; Education Law, § 313; Civil Rights Law, § 40; Executive Law, § 290).

The Supreme Court of the United States has held that Negroes cannot be "denied admission to schools attended by white children under laws requiring or permitting segregation according to race" without denying the equal protection of the law (*Brown* v. *Board of Educ.*, 347 U. S. 483, 488; 349 U. S. 294). That principle is contradicted by the

holding of the Appellate Division in this case. Where is the line to be drawn between allocating persons by law to schools or other institutions or facilities according to color to promote integration, and doing the same thing in order to promote segregation? Is the underlying principle not the same in either instance? Both depend on racism. If one is legally justifiable, then so is the other. There is no law which says that school children or others may be allocated according to race until there are 50% of each. If that be the guiding principle, it is honored more in the breach than in the observance.

There is an important difference between obliterating the color line by admitting a boy or girl or man or woman to a school, to employment, to a residential location or to a place of public accommodation without regard to color, and allocating people to locations, employments or facilities because of their color. The latter is what the Commissioner of Education has done in this instance. It is one thing to insist that a person should not be excluded by law from a vocation, school, theatre, hotel, restaurant or public conveyance because of color; it is quite another matter and, as it seems to me, doing the reverse, to allocate these advantages according to racial quotas or on some other proportional racial basis.

Racial questions are acute today. They occupy a great deal of public attention. At other times religious issues or questions of national origin have bulked large. Considered as a question of constitutional or statutory law, is there any more justification to billet Negroes and Caucasians here and there by law, so as to assemble them or keep them apart, than would be the case, for example, if the Commissioner of Education were to decide to do the same thing with Catholics, Protestants, Jews or any other ethnological or religious group? Could he legally determine, for instance, that there were too many Catholics and not enough Jews in a particular school, or that some Presby-

terians, Episcopalians or Swedenborgians should be added to bring their particular cultural leavens? Or, on the effect of inferiority complexes induced by the appearance of status or the lack of it, can similar measures be taken by law to avert *de facto* imbalance between the successive waves of immigrants who have come to these shores during the last century or less, each of whom has been inclined to look deprecatingly at the next most recent arrival? Could the Commissioner legally compel the alteration of school populations on the ground that there were too many of southern European extractions and not enough Celtic in a particular school, and that psychological damage was being done because the latter looked down on their fellow citizens who came more recently from southern Europe and therefore had not achieved the same distinction in America as though they had immigrated earlier in time? National origin and religion are bracketed with racial discrimination in all of these statutes and decisions. The Commissioner of Education seems to have realized this in 1956 (after the United States Supreme Court decided the *Brown* case) in a determination by him reported in 77 State Department Reports at page 37, and referred to in the opinion of Special Term (41 Misc. 2d 200, 204). There, although it was asserted that pupil attendance in one of the schools in an attendance area would be 80% Negro, the Commissioner, denying relief, said (p. 38): "Because of the incidence of location, the mere fact that the preponderance of the children who would normally attend the neighborhood school happened to be white or negro, of Polish, Irish, Scotch, Swedish, Italian or English descent or otherwise or who espouse one religion or another, does not require a board to attempt to gerrymander the lines, to assign but a certain percentage to a particular school. This would constitute as much discrimination as a gerrymandered line to accomplish the opposite effect."

This is as true now, it seems to me, as it was when the Commissioner said it in 1956. Nor does it legalize the utilization of race, religion or national origin, as a basis for allocation of students that, instead of gerrymandering the district, pupils are transferred from one school to another on the basis of race. It is true that the racial question in this country is today of outstanding importance, and that a great deal of attention and ability is being focused upon its solution. Old and deeply embedded but artificial lines of distinction are being removed; employment, housing and public accommodations as well as schools are being opened to many for whom they were long overdue. But because it is becoming recognized that for many years the Negro has been unfairly discriminated against, it does not follow that the balance can legally be redressed by quota systems, or their equivalent, which operate on the basis of distinctions based on race, religion or national origin instead of their negation.

The Supreme Court of the United States held in the *Brown* case that *de jure* segregation denies the equal protection of the law in violation of the Fourteenth Amendment to the United States Constitution. It did not relate to *de facto* segregation, nor hold that educational authorities were obliged or empowered to eliminate racial imbalance by resorting to the racial distinctions which the *Brown* decision inhibited.

I vote to reverse the order of the Appellate Division and to reinstate the order of the Special Term on the opinion at Special Term and on the dissenting opinion in *Matter of Balaban* v. *Rubin* (14 N Y 2d 193, 199).

Scileppi, J. (dissenting): Union Free School District No. 12 of the Town of Hempstead, commonly known as the Malverne-Lakeview School District, lies partially within the villages of Malverne and Lynbrook, and includes some incorporated areas of the Town of Hempstead. The

public school facilities are comprised of a senior high school, a junior high school and three elementary schools. At the present time, the junior and senior high schools accommodate all children in grades 6-12 in racially balanced classes. Thus, only the three elementary schools serving grades 1-5 are here in question.

These three elementary schools are so-called neighborhood schools, each serving a small compact residential area and each reflecting the composition of the surrounding residential neighborhood in its pupil enrollment. The attendance zones or areas for each school were laid out many years ago and all parties to the present action agree that considerations of race, color or creed played no part in their formation. Rather, the lines were drawn with such factors in mind as safety, traffic conditions, proximity to the home and various other interests which were in keeping with prevailing attitudes recognizing the advantages of making the school an integral part of a given neighborhood. It was thought that great benefits were derived from such an arrangement in the form of greater parental interest in the activities of the school and greater exchange of ideas between home and school.

The three elementary schools in the district are called the Woodfield Road School, Davison Avenue School and the Lindner Place School. It seems that while the attendance areas served by these three schools were comparable for some time, the attendance area served by the Woodfield Road School has had a substantial increase in Negro residents and this, naturally, has become reflected in the pupils attending the Woodfield School. So far, the school board has attempted to rectify the resulting imbalance by transferring pupils from Woodfield to one of the other two elementary schools, but the imbalance at Woodfield continues.

In an attempt to correct the racial imbalance in grades 1-5, Negro children, through their parents, appealed to

the Commissioner from the refusal of the Board of Education to alter the zoning areas for school attendance, pursuant to section 310 of the Education Law providing for such appeals. The Commissioner appointed a 3-member committee, containing 2 members of the National Association for the Advancement of Colored People, to investigate the situation. This committee found that the attendance areas were of suitable size, as compact as possible, and placed the children within convenient walking distance of their schools. The Woodfield Road pupils were afforded programs of remedial work and enrichment at all grade levels. Relying upon its personal inspection of the three schools, the committee stated that the educational standards, as well as the quality of teaching, were similar. In addition, the committee noted that the action of the local board was not arbitrary and was not actuated by an attempt to contain the Negro population by means of artificial school zones. A finding was made that the Woodfield Road School was racially imbalanced, and *ipso facto* social, psychological and educational problems exist in *this* school district. In short, the committee found that the school district under consideration was "an excellent example of administrative planning", not created to separate the races, and that all the tangible aspects of education were equal. The Commissioner, concluding that a racial imbalance deprived the Negro children in Woodfield Road School of equal educational opportunities, ordered that the attendance areas of the district be drawn so that all children from kindergarten through the third grade attend either the Davison Avenue or Lindner Place Elementary School, and that all children in fourth and fifth grades attend the Woodfield Road School.

Although the Legislature has bestowed a vast grant of power upon the Commissioner of Education, the courts do have a limited scope of review. We have held that the courts possess the power to review his acts only when they

are "purely arbitrary" (*Matter of Board of Educ. of City of N. Y.* v. *Allen*, 6 N Y 2d 127, 136). As courts approach the pivotal issue of arbitrariness, proper performance of their function requires that the administrative agency show the actual grounds for its decision (*Matter of Scudder* v. *O'Connell*, 272 App. Div. 251). This exposition of the reasons for a decision has a twofold purpose. First, it enables the court to determine whether the findings themselves are properly supported by the evidence, and, second, it is necessary to determine whether the facts found support the decision itself (*Matter of Scudder* v. *O'Connell*, 272 App. Div. 251, *supra*).* In *New York Water Serv. Corp.* v. *Water Power & Control Comm.* (283 N. Y. 23) we stated: "Findings of fact in support of decisions by courts and administrative boards alike serve to give assurance to parties concerned that the decisions are based upon evidence of record and were not reached arbitrarily or influenced by extra-legal considerations * * * findings of fact in some form are essential to enable the parties and any appellate court intelligently to determine whether the decision follows as a matter of law from the facts stated as its basis and whether the findings of fact have any substantial support in the evidence" (p. 30). Throughout our reports, cases reiterate the substance of the above extract (see, e.g., *Matter of Barry* v. *O'Connell*, 303 N. Y. 46; *Matter of Perpente* v. *Moss*, 293 N. Y. 325; *Matter of Elite Dairy Prods.* v. *Ten Eyck*, 271 N. Y. 488). The Commissioner reasons as follows:

Major premise: Racially imbalanced schools *always* afford unequal educational opportunities.

Minor premise: This school is racially imbalanced.

Conclusion: Therefore, this school affords unequal educational opportunities.

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* Of course, the reasons underlying the determination are necessary to enable an aggrieved petitioner to ascertain which avenue of attack should be selected.

Since the record before this Court is utterly barren of any evidence which supports the Commissioner's conclusion that racial imbalance (an uncertain and indefinable phrase) necessarily results in unequal educational opportunities, I am constrained to hold that he has acted in a "purely arbitrary" manner. If it is not purely arbitrary to conclude and give no reasons therefor, I cannot conceive of any situation which may be so characterized.

Although I recognize the vast amount of power which is deposited in the Commissioner, I am unwilling to join the majority in placing him in an insulated position from which he is permitted to pronounce unreviewable conclusions devoid of any evidentiary support. Undoubtedly such is the reasoning of the prevailing opinion which, for all practical purposes, closes the courthouse doors to those who seek to review acts of the Commissioner in this area. If they are correct in the conclusion reached, the majority must be prepared to hold that assignment of pupils to create an ethnic or religious balance, or even the transportation of pupils (e.g., bussing) to implement a balancing plan, is beyond the review of the courts and may not be questioned therein. When the Commissioner states that he is acting in furtherance of sound educational policies, albeit there is no evidence in the record to support him, the majority holds that the courts will not be available for review.

I am unimpressed by the argument that the Commissioner might produce evidence and make findings to support his conclusions. Our function is to judge a case *on the record before the court*, not on assumption, speculation or conjecture.

Viewing the case in this posture, I need reach neither the impact of section 3201 of the Education Law nor the constitutional question to which Judge Van Voorhis has addressed himself, both of which the majority necessarily passes upon. However, I do state that I do not consider

Matter of Balaban v. *Rubin* (14 N Y 2d 193) authority in cases of this nature because (1) that case concerned the selection of a site for a *new* school; (2) race was not the *sole* factor which actuated the choice of location, and (3) there were neither transfers nor "oppressive results" involved.

For the reasons stated above, I vote to reverse the order of the Appellate Division.

Chief Judge Desmond and Judges Dye, Fuld, Burke and Bergan concur in *Per Curiam* opinion; Judges Van Voorhis and Scileppi dissent in separate opinions.

Order affirmed.

Appendix B—Judgment of the Court Below

At a term of the Supreme Court in the State of New York held in and for the County of Albany at the County Court House in the City of Albany, State of New York, on the 9th day of April 1965.

Present:

HON. SIDNEY F. FOSTER,
Justice.

Index No. 5217/1963

In the Matter of

The Application of MICHAEL VETERE, individually and as the parent and natural Guardian of ANITA VETERE, an infant, and as a Resident and Taxpayer of the County of Nassau, and of Union Free School District No. 12, Town of Hempstead, State of New York,

Petitioner-Appellant,

For an Order under Article 78 of the Civil Practice Act, to Review the Determinations and Orders of JAMES E. ALLEN, JR., as Commissioner of Education of the State of New York,

Respondent-Appellee,

Directing the Board of Education of Union Free School District No. 12 of the Town of Hempstead, New York to Assign Pupils to and Exclude Pupils from, Schools within the said District on the Basis of their Race.

Appendix B—Judgment of the Court Below

Index No. 5440/1963

In the Matter of

The Application under Article 78, CPLR, of LEWIS HUMMEL and HERMAN ABRAMS, individually and as the Respective Parents and Natural Guardians of SALLY ANN HUMMELL and ELLIOT ABRAMS, Infants, and as Residents and Taxpayers of the County of Nassau, and of Union Free School District No. 12 of the Town of Hempstead, New York,

Petitioners-Appellants,

against

JAMES E. ALLEN, JR., as Commissioner of Education of the State of New York, and the Board of Education of Union Free School District No. 12 of the Town of Hempstead, New York,

Respondents.

A Petition having been filed by Michael Vetere, individually and as the parent and natural guardian of Anita Vetere, an infant, and as a resident and taxpayer of the County of Nassau, and of Union Free School District No. 12, Town of Hempstead, State of New York, and by Lewis Hummel and Herman Abrams, individually and as the respective parents and natural guardians of Sally Ann Hummel and Elliot Abrams, infants and as residents and taxpayers of the County of Nassau, and of Union Free School District No. 12 of the Town of Hempstead, New York to review and set aside a determination of the respondent Commissioner of Education, directing the Board of Education of Union Free School District No. 12 of the Town of Hempstead, to take certain action in relation to the assignment of pupils to schools within said district and said petition having duly come on to be heard at a Special Term of

the Supreme Court, Albany County, and after due deliberation said Court having rendered its decision directing that the determination of the respondent Commissioner be annulled, and an appeal having been taken by the respondent Commissioner of Education from the order of the Supreme Court aforesaid to the Appellate Division, Third Department, and said appeal having duly come on to be argued before the said Appellate Division of the Supreme Court and that Court having reversed so much of the decision of the said Supreme Court that annulled a determination of the Commissioner of Education and as denied the motion of the Commissioner of Education to dismiss the petition and the Petitioners herein having appealed to this Court from the said order of the Appellate Division, Third Department, and said appeal having come on to be heard before the Court of Appeals and after argument and reargument by Mason L. Hampton, Jr., of Counsel for the Petitioners and by Mr. Thomas L. Driscoll of Counsel for the Board of Education aforesaid and by Charles A. Brind, Esq., of Counsel for the Respondent Commissioner and by Robert L. Carter, Esq., of Counsel for Respondent Mitchell, et al., and due deliberation having been had thereon and said Court having rendered its decision that the order of the Appellate Division of the Supreme Court appealed from be affirmed without costs, and having further ordered that the records and the proceedings in the Court of Appeals be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law,

Now, on motion of Charles A. Brind, Attorney for respondent, Commissioner of Education of the State of New York,

It is ordered that the order of the Court of Appeals in the above entitled matter which affirmed the decision of the Appellate Division, Third Department herein which

said order of the Appellate Division, Third Department reversed so much of the order of the Special Term as set aside the determination of the Commissioner of Education therein referred to, be and the same hereby is made the order of this Court, and it is further,

ORDERED that respondents have judgment dismissing the petitions herein.

Dated: Albany, New York
April 7, 1965

s/ SYDNEY F. FOSTER
Justice, Supreme Court